IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 42 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHAMED VALIBHAI & 1 - Appellant(s)
Versus
IBRAHIM AHMED DOLA - Defendant(s)

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Appearance :
MR SK BUKHARI for Appellant(s) : 1 - 2.
RULE SERVED for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 09/03/2007

ORAL JUDGMENT

1. Present is an appeal by dissatisfied plaintiffs, who succeeded before the trial court, but the decree was dislodged in the appeal.

2. Plaintiff, Mohammed Vali and another filed the suit under Order I Rule 8 read with section 91 of the Code of Civil Procedure, 1908. It was submitted by them that the defendants had made trespass over public land by raising certain construction and as the width of the road was 15 feet, which because of the encroachment made by the defendants was reduced to 11 feet, the court should direct by issuing a mandatory injunction for removal of the encroachment. Learned trial court issued notice to the defendants who submitted before the trial court that they had not made any encroachment. After recording the evidence and hearing the parties, learned trial court decreed the suit, however, in the appeal filed by the defendants, the appellate court held that from the Commissioner's report, it was apparent and clear that width of the road was different at different places ranging between 11 feet and 9 inches to 15 feet. It also held that the plaintiffs failed to prove that the width of the road at all possible places was 15 feet and the defendants had made encroachment on the public road. The appellate court accordingly allowed the appeal and dismissed the suit. The plaintiffs are before this Court challenging the correctness, validity and propriety of the said judgment and decree. The appeal has been admitted for hearing the parties on the following substantial questions of law:-

> “1. Whether the judgment and decree which has been recorded by the lower appellate court without taking into consideration sanads of city survey nos. 63 and 61 and the maps prepared by the Court Commission which are at exs. 72,73 and 57 respectively is sustainable?
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> 2. Whether in the facts and circumstances of the case, the judgment and decree passed by the lower appellate court reversing the decree recorded by the trial court is in accordance with law?”

3. Learned counsel for the appellants submits that the lower appellate court had not taken into consideration the Sanads of city survey nos.63 and 61 and the maps prepared by the Court Commissioner at exhs. 72, 73 and 57. In the opinion of this Court, the argument is misconceived. From the judgment of the first appellate court, it would clearly appear that it had taken into consideration all relevant material including the map prepared by the Commissioner appointed by the court. A Commissioner cannot decide a disputed question if he is required to go for spot inspection. Order XXVI Rule 9 relates to issuance of commissions to make local investigations. When the Commissioner is authorized to make investigations, then he only has to make local

investigations and is not required to make his comments or give his opinion. In the present case, the report submitted by the Commissioner could be used to the limited extent of ascertaining that what was the position of the spot and not anything beyond that. Sanads do not say that adjoining the constructed area government property stands. If there is nothing on the records to show or suggest that the road at all places was 15 feet wide, then no finding can be recorded in favour of the plaintiff on the basis of the Commissioner's report.

4. In a given case, where plaintiff comes to the court with a submission that the property belongs to the government and it was a thoroughfare available to everybody, then such plaintiff is required to prove the fact as alleged by him either by examining some officer of the Revenue Department or by producing village maps in which entries relating to thoroughfare, public lanes, public ways are made. In the present case, unfortunately, the plaintiffs neither summoned the witnesses from the Revenue Department nor produced revenue entries to show that particular place was earmarked for a thoroughfare.

5. So far as the second question is concerned, I must immediately hold that the learned appellate court was absolutely justified in reversing the decree. Even if another view is possible, then too, it would not be permissible for the High

Court to reappreciate the entire evidence and record some finding which, on appreciation of the evidence, the first appellate court could record. High Court can make interference in a given case only if the findings are perverse and not otherwise.

6. I am unable to hold that the judgment and decree passed by the learned first appellate court call for any interference. Both the questions on which the appeal has been admitted are decided against the interest of the appellants-plaintiffs and the appeal is dismissed. No costs.

7. Let a decree be framed accordingly.

[R.S. GARG, J.]

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